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No. 82-142

IN THE

Supreme Court of the United States

October Term, 1982

MURRAY NEWMAN and CAPITOL MOTORS, INC.,
Petitioners,

v.

G. ERNEST TIDWELL, Judge of the United States District Court for the Northern District of Georgia,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Brief of Respondent Murray M. Silver in Opposition

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Question Presented.

Whether the Eleventh Circuit properly denied petitioners' petition for a writ of mandamus (28 U.S.C. §1651) directed to G. Ernest Tidwell, United States District Judge for the Northern District of Georgia, who had quashed a trial subpoena *duces tecum* (Rule 45[e], F.R.Civ.P.) obtained, issued and served by petitioners in Atlanta, Georgia, directed to a local bank, for the production of bank records for use at a trial then in progress in the United States District Court for the Southern District of New York.

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MURRAY NEWMAN and CAPITOL MOTORS, Inc.,

Petitioners,

v.

G. ERNEST TIDWELL JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Brief of Respondent Murray M. Silver in Opposition.

Respondent Murray M. Silver respectfully requests that this Court deny the petition for writ of certiorari seeking review of the denial of a writ of mandamus (28 U. S. C. §1651) by the Eleventh Circuit, directed against respondent G. Ernest Tidwell, United States District Judge for the

Northern District of Georgia. The court below did not write any opinion in denying the mandamus petition.

Statement of Facts.

Respondent Murray M. Silver is an attorney practising law in Atlanta, Georgia. During the summer of 1978 he was retained by petitioners Murray Newman and Capitol Motors, Inc., along with a co-defendant, all of whom were engaged in the used car business in Bronx, New York, to represent them in a criminal prosecution against them then pending in the District Court for the Southern District of New York. The charges included "odometer rollbacks," wire fraud and mail fraud, arising out of their conduct of their used car business. These charges were contained in an indictment of sixty-six counts. On August 17, 1978, shortly before the scheduled criminal trial, petitioners and their co-defendant elected to change their pleas from "not guilty" to "guilty," as to a number of counts; and on October 6, 1978 they were sentenced on their pleas of guilty. Shortly thereafter appearing by new counsel, petitioners moved to withdraw their guilty pleas as to the wire fraud and mail fraud counts, but not as to the "odometer rollback" counts. During a hearing before the sentencing judge, they withdrew this motion. Thereafter on motion for reduction of sentence the prison sentence imposed against petitioner Newman was reduced, and he then served his prison sentence.

In March 1980 petitioners commenced an action against respondent Silver in the New York state court, but upon removal petition the action was removed to the District Court for the Southern District of New York. The complaint against Mr. Silver alleged a claim of attorney "malpractice," which was denied. Following the completion of the oral pre-trial depositions conducted by both

sides in the summer of 1980, petitioners sought to depose Mr. Ralph LiButti, the person through whom he met respondent Silver. When Mr. LiButti "resisted" being deposed, and was successful in quashing the deposition subpoena which had been left at his daughter's home, petitioners then moved to add Mr. LiButti as a defendant in the action, upon an amended complaint alleging a conspiracy between Mr. Silver and Mr. LiButti to obtain approximately $200,000.00 from Mr. Newman. The amended complaint also alleged that Mr. Silver shared his legal fees with Mr. LiButti, all of which was denied now by both defendants. In the pre-trial deposition of Mr. LiButti only one question was asked concerning whether Mr. Silver had "ever transferred any money to you" (LiButti deposition, September 10, 1981, Tr. 41), to which Mr. LiButti responded "No." No questions were asked about Mr. Silver's bank accounts at the Trust Company Bank of Atlanta, and no attempt was made during the pre-trial proceedings to depose the bank or to obtain records of Mr. Silver's bank accounts.

Under date of November 16, 1981, District Judge Robert W. Sweet entered a pre-trial order which terminated all discovery proceedings as of January 4, 1982. The order also required plaintiffs to "submit a draft of a pre-trial order to the defendants on or before the completion of discovery," as of the same date. However, no pre-trial order ever was prepared by plaintiffs, and the trial of the case began on January 13, 1982, before Judge Sweet, sitting without a jury, without any pre-trial order being submitted or filed.[1] Later, on January 18, 1982, while Mr.

[1] Parentetically, on the day fixed for the start of the trial, petitioners sought to delay the trial, and when Judge Sweet denied their application, petitioners filed a mandamus petition in the Second Circuit, which promptly denied the petition.

Silver was testifying as a witness, having been called by petitioners, he was served in the court room with a subpoena *duces tecum* for his bank records. Judge Sweet directed Mr. Silver to comply with this subpoena. Some of the records called for by the subpoena were delivered then and there in the court room. The bank records listed in the subpoena were in Atlanta. Mr. Silver returned to Atlanta while the trial was in recess, obtained photocopies of the bank records and these were then submitted both to the court and counsel in the case. Following his receipt of the bank records, petitioners' New York attorney, Robert A. Katz, Esq., focused on certain entries contained therein, and thereupon demanded further bank records. He also requested an order from Judge Sweet that respondent Silver be ordered to sign an authorization to the bank to furnish petitioners with copies of the requested items. At a chambers' conference held on February 26, 1982, Judge Sweet denied petitioners' request for Mr. Silver to sign such authorization. At this point the trial was adjourned to March 16, 1982, for a final session to permit petitioners to question Mr. Silver about his bank records.

Thereafter under date of March 9, 1982, petitioners now acting through Atlanta counsel, obtained a blank form of trial subpoena *duces tecum* (Rule 45[e], F.R.Civ.P.) from the clerk of the District Court for the Northern District of Georgia, had the form typed in and served upon the Trust Company Bank of Atlanta. In completing this subpoena form, petitioners' Atlanta counsel filled in as the caption of the action the trial then in progress in New York, and made it returnable on March 12, 1982, at 3:00 o'clock P.M., before the district court in Atlanta, at no specific place and before no specific judge or magistrate. It should be noted that petitioners did not seek to depose the bank as in discovery proceedings and did not serve and file a

notice to depose the bank under Rule 30(b), F.R.Civ.P; nor obtain a deposition subpoena under Rule 45(d), F.R.Civ.P.

On March 13, 1982, the parties all assembled at the office of the clerk of the district court in Atlanta. The clerk treated the affidavit of Robert A. Katz, Esq., dated March 8, 1982, as a complaint or petition and filed the same in his court records as the opening pleading of a new action, assigning it Docket No. C 82-509A. Respondent Silver then filed a petition with the district court to quash the trial subpoena obtained and issued as described above, and to enjoin the bank from complying with it. The clerk filed this petition in the same proceeding. Thereupon all parties were directed to appear before District Judge G. Ernest Tidwell for a hearing on the entire matter. After argument the court reserved decision. Thereafter Judge Tidwell filed his decision and order quashing petitioners' subpoena, but also incidentally holding that respondent Silver lacked standing to contest "the banks' amenability to compulsory process of this court."[2] Petitioners then appealed to the Eleventh Circuit from Judge Tidwell's order quashing the subpoena.

On March 16, 1982, petitioners applied to Judge Sweet in New York to delay the final session of the trial scheduled for the next day, and again for an order directing Mr. Silver to execute an authorization to the bank to produce the records. Judge Sweet declined to grant the application. On March 17, 1982, the trial was resumed, Mr. Silver appeared and testified, and then at pages 80-81 of the daily transcript, petitioners, through their counsel, made the following statement:

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[2]Respondent Silver disagrees with this ruling, but has not been required to test its correctness.

"Mr. Katz: Your Honor, at this time I have a motion. We have rested."

Having voluntarily rested petitioners' case, without reservation, the proceedings to obtain the bank records became moot.[3]

Petitioners' notice of appeal from Judge Tidwell's order was filed on March 19, 1982, and was assigned Docket No. 82-8173 in the Eleventh Circuit. On April 16, 1982, petitioners filed their mandamus petition, which was assigned Docket No. 82-8197. On April 21, 1982, a panel of the court of appeals (Hill, Vance and Hatchett, CJJ) denied the petition for mandamus without requiring any response thereto (Rule 21[b], F.R.App.P.)

Thereafter, under date of April 28, 1982, respondent Silver moved before the court of appeals to dismiss the appeal from Judge Tidwell's order on grounds that (1) the underlying trial for which the trial subpoena had been obtained was concluded, thereby mooting the appeal; (2) the order from which the appeal was taken was not a final decision, thereby not appealable, and no motion had been made in the district court for an interlocutory appeal (28 U.S.C. §§ 1291, 1292[b]); and (3) the appeal was patently frivolous and without any merit whatsoever (Rule 18 of the Eleventh Circuit's Interim Rules and Rule 38, F.R.App.P). Following petitioners' response to this motion, on June 2, 1982, the court of appeals, by a different panel of judges (Tjoflat, Fay and Henderson, CJJ), dismissed the appeal, stating:

"The appeal is frivolous on its face."

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[3]Respondent Silver has not attempted to respond to petitioners' statement of purported facts in their petition for certiorari (pp. 5-8), believing that such response will not serve any useful purpose. Suffice to state, respondent Silver challenges the correctness, relevance and materiality of many of the statements of purported fact.

Reasons For Denying the Writ.

A long and virtually unbroken line of cases in this Court have held that the remedy of mandamus is a drastic one, to be invoked rarely, and only in extraordinary situations, where the claim to immediate relief is clear and undisputed. *Allied Chemical Corporation v. Daiflon, Inc.*, 449 U.S. 33, 34-36 (1980); *Kerr v. United States District Court*, 426 U.S. 394, 402-403 (1976); *Will v. United States*, 389 U.S. 90, 95 (1967); *Schlagenhauf v. Holder*, 379 U.S. 104, 109-112 (1964); cf. *Will v. Calvert Fire Insurance Company*, 437 U.S. 655, 661-662 (1978, plurality opinion); *Chandler v. Judicial Council*, 398 U.S. 74, 89, 112-117 (1970, concurring opinion by Harlan, J).

In the *Allied Chemical* case, *supra*, this Court wrote as follows, *per curiam*:

> "It is not disputed that the remedy of mandamus is a drastic one, to be invoked only in extraordinary situations. *Will v. United States*, 389 U.S. 90, 95 (1967); *Bankers Life & Cas.Co. v. Holland*, 346 U.S. 379, 382-385 (1953); *Ex parte Fahey*, 332 U.S. 258, 259 (1947). On direct appeal from a final decision, a court of appeals has broad authority to 'modify, vacate, set aside or reverse' an order of a district court, and it may direct such further action on remand 'as may be just under the circumstances.' 28 U.S.C. § 2106. By contrast, under the All Writs Act, 28 U.S.C. § 1651 (a), courts of appeals may issue a writ of mandamus only when 'necessary or appropriate in aid of their respective jurisdiction.' Although a simple showing of error may suffice to obtain a reversal on direct

appeal, to issue a writ of mandamus under such circumstances 'would undermine the settled limitations upon the power of an appellate court to review interlocutory orders.' *Will v. United States*, 380 U.S. 90, 98 n.6 (1967).

"This Court has recognized that the writ of mandamus 'has traditionally been used in the federal courts only to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.' *Will v. United States, supra*, at 95, quoting *Roche v. Evaporated Milk Assn.*, 319 U.S. 21, 26 (1943). Only exceptional circumstances, amounting to a judicial usurpation of power, will justify the invocation of this extraordinary remedy. *Ibid.*

"The reasons for this Court's chary authorization of mandamus as an extraordinary remedy have often been explained. See *Kerr v. United States District Court*, 426 U.S. 394, 402-403 (1976). Its use has the unfortunate consequence of making a district court judge a litigant, and it indisputably contributes to piecemeal appellate litigation. It has been Congress' determination since the Judiciary Act of 1789 that as a general rule appellate review should be postponed until after final judgment has been rendered by the trial court. A judicial readiness to issue the writ of mandamus in anything less than an extraordinary situation would 'run the risk of defeating the very policies sought to be furthered by that judgment of Congress.' *Ibid.* In order to insure that the writ will issue only in extraordinary circumstances, this Court has required that a party seeking issuance have no other adequate means to attain the relief he desires, *Kerr v. United States District Court, supra*, at 403; *Roche*

> *v. Evaporated Milk Assn., supra,* at 26, and that he satisfy the 'burden of showing that [his] right to issuance of the writ is "clear and indisputable" ' *Bankers Life & Cas. Co. v. Holland, supra* at 384, quoting *United States v. Duell,* 172 U.S. 576, 582 (1899). In short, our cases have answered the question as to the availability of mandamus in situations such as this with the refrain, 'What never? Well, hardly ever' " (449 U.S. at 34-36).

In this case it is clear that petitioners improperly sought to invoke mandamus as a second string to their bow after having appealed from the order of the district court quashing their improperly issued trial subpoena. The court of appeals denied mandamus without requiring respondents to file any response to the petition (see Rule 21[b], F.R.App.P.), and without opinion.

Thereupon respondent Silver moved in the court of appeals to dismiss the appeal taken by petitioners from the order of Judge Tidwell. Respondent Silver set before the court a detailed set of motion papers, including all of the relevant proceedings before Judges Sweet (in New York) and Tidwell (in Atlanta). The court of appeals, by a different panel of judges dismissed the appeal with the succinct entry:

> "The Motion of appellee to dismiss the appeal is granted. The appeal is frivolous on its face."

There is no need to belabor the point. The petition for a writ of certiorari, as with the original appeal from Judge Tidwell's order, "is frivolous on its face."

CONCLUSION.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

August 9, 1982

Respectfully submitted,

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